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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 660

KENNETH JACOBS, FLORENCE KARPF AND JONAS MEKAS, *Appellants,*

vs.

PEOPLE OF THE STATE OF NEW YORK, *Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE TERM, FIRST JUDICIAL DEPARTMENT

BRIEF OF AMICUS CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

Interest of Amicus

Amicus submits this brief (with the consent of the parties, which is on file in the Clerk's office) because of its support, since its inception in 1947, of free expression in the arts and, in particular, its dedication to the encouragement of

innovation and experimentation by student film-makers. The Association, a confederation of nearly 300 student governments of colleges in the United States, representing hundreds of thousands of students who form the largest segment of the audience for contemporary cinema, has always sought to foster creativity in the making of motion pictures. In November, 1966, the Association, in conjunction with the Motion Picture Association of America and the Lincoln Center for the Performing Arts, sponsored a National Student Film Festival in New York which drew over 135 entries. The guiding criterion for the selection of entries for exhibition was excellence. The festival regulations specified that no censorship would be exercised. We believe, as our Codification of Policy declares, that no punitive action should be directed against those who seek to express ideas. We are filing this brief on the basis of our fear that, unless this case is reviewed and reversed, its restriction on the ability of film-makers to experiment and express ideas will inhibit all work, by students and others, in this medium and seriously handicap the development of film art.

Questions Presented

1. Whether Section 1141 of the New York Penal Law as construed and applied abridged appellants' freedom of expression and deprived them of due process by permitting the trial court to deny them the opportunity to introduce expert and other evidence bearing on the constitutional criteria of obscenity.

2. Whether Section 1141 of the New York Penal Law as construed and applied abridged appellants' freedom of expression by permitting them to be convicted of criminal obscenity in the absence of proof either that they believed

that the film was obscene or that the film had previously been adjudged obscene.[1]

Statement

This case involves an obscenity conviction of three members of a cooperative society of experimental film-makers for participating in one showing of an avant-garde motion picture for the benefit of that society. The description of the conduct of appellants and the movie itself constituted the entire case in chief for the People as well as substantially all the evidence the court was willing to entertain. In the presentation of their defense, appellants sought to present expert and other evidence bearing on the constitutional tests of obscenity. By a two-to-one vote the court repeatedly excluded the testimony that appellants wanted to adduce, leaving appellants' section of the record following the court's screening of the movie (R. 85)[2] virtually barren of anything but the witnesses' qualifications and appellants' exceptions to each of the court's restrictive rulings.

The case for the People—The people produced only two witnesses, Detectives Arthur Walsh and Michael O'Toole, who established that on the evening of March 3, 1964, a motion picture created by Jack Smith—"Flaming Creatures"—was shown at the New Bowery Theatre, a small room containing 92 seats, located at 4 St. Mark's Place in New York, New York (R. 20-21, 25-26). Appellant Jacobs ran the projector, appellant Karpf handled the ticket sales,

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[1] This question of the quality of *scienter* required by the First Amendment has already been briefed and argued in this Court this term in connection with the same statute. *Redrup* v. *New York,* No. 3, 1966 Term. Accordingly, while recognizing that this question is also presented on the record in this case, which reveals that appellants were familiar with the contents of the film, but believed it to be a work of art (R. 35, 78-80, 91), we do not discuss it in the Argument section of this statement.

[2] All R. references are to the Record on Appeal.

and appellant Mekas arranged for the showing (R. 22, 28-31, 33-34, 44, 70, 75, 78-79, 92). All of the appellants had seen the movie previously and considered it to be a work of art (R. 35, 78-80, 91). Detective Walsh thought otherwise. He classified the film alternatively as "garbage" (R. 35) or as "indecent, lewd and obscene" (R. 5, 63). He and Detective O'Toole arrested appellants and seized the film in the absence of any arrest or search warrants, pursuant to strategy planned two days before in the District Attorney's office (R. 34, 48-50, 76, 78). The People relied on the movie "on its face" to complete their case (R. 79) and did not submit any other evidence with respect to any of the constitutionally required elements of obscenity.

The defense—Before appellants were able to swear in their first witness, the prosecutor objected "to any line of questioning dealing with a question of artistic merit or community standards" (R. 135-136). The court noted the objection, but waited until appellants called Louis Allen, an established, successful producer of plays and motion pictures, including *Lord Of The Flies*, who knew appellant Mekas as a recognized film critic and the editor of one of the outstanding magazines treating film as an art form (R. 137-141, 143-144). The court refused to allow Allen to state and explain his view that the film was a serious, talented work of art that poetically and wittily satirized advertising, fashion, love, and society's use of sex (R. 146-148, 150). Nor would they let him express his opinion either about contemporary community standards or the reactions of average persons to such a picture (R. 145-147, 152). His description of a film created by Ingmar Bergman, *The Silence*, which portrayed comparable scenes and was being widely commercially exhibited to large audiences, particularly in New York (where its showing had been approved by the Board of Regents) was intended to illustrate com-

munity standards, but was excluded, with Judge Rohan in the minority (R. 154-156, 159-160).[3]

The court treated every other witness that appellants brought to the stand in similar fashion. Willard Van Dyke was able to inform the court that he was a producer of hundreds of documentary films, particularly ones dealing with community problems and mores, as well as a film festival judge (R. 163-164, 169-170). All of this background did not enable Van Dyke to testify that he viewed "Flaming Creatures" as a work of art or how he regarded its cinematic quality from the point of view of technique (R. 165-167, 170-171). Like Allen, he was prevented from referring to other films depicting sexual objects and activities equivalent to those contained in "Flaming Creatures" (R. 168-169).

Herman Weinberg told the court that he was a teacher of film history at the City College of New York (where his course studied contemporary community standards relating to motion pictures), a critic, a film festival judge, and an author engaged in a ten-year study of movie morals and film censorship (R. 173-178, 181). That was all the court was willing to hear from him. It ruled inadmissible his opinion that "Flaming Creatures" was an aesthetic production that satirized sex and an experimental film that employed artistic technique. (R. 182, 184). It refused to countenance any discussion of comparable films then playing (R. 182-184).

Susan Sontag was introduced to the court as a novelist, teacher of philosophy at Columbia University, and a writer

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[3] Judge Rohan's dissent was either expressed by him or noted by Presiding Judge Impellitteri to almost every action of the court thereafter in sustaining the People's objections to the admissibility of evidence proffered by appellants (R. 161-162, 165, 168, 170, 171, 180, 181, 183, 184, 197-198, 199, 201, 203, 204, 205, 239, 240, 248, 249, 250, 251, 273, 274, 275, 283, 284, 288).

of considerable film criticism, including a three-page analysis and critique of "Flaming Creatures" that appeared in the April 13, 1964 issue of *The Nation* and was admitted into evidence (R. 191-198). She defined the avant-garde movement in film in terms of "a small group of people who are doing experimental work that is usually just mainly followed by critics and by other artists" (R. 193, 209-210), but was barred from setting forth her opinion of the film's predominant appeal and her knowledge of similar films and Jack Smith's artistic talents (R. 196-206).[4]

After Miss Sontag left the stand, appellants' counsel moved for a mistrial on the ground that the majority of the court had apparently already determined that the movie was obscene and, therefore, was foreclosing appellants from presenting any evidence in their behalf (R. 206-207, 231-235). The court, in denying this motion, ruled that it had not arrived at any conclusion as to appellants' guilt or innocence and reasserted its admissibility rulings (R. 235-236), with Judge Rohan carefully explaining the basis of his refusal to go along with the majority (R. 227-230).

All of appellants' remaining witnesses were also shut off as soon as they had stated their qualifications. Shirley Clark, a film-maker, director and instructor in film literature at Columbia University, was limited briefly to describing the Film-Makers' Cooperative as a distributor of experimental films and could not voice her opinion of the film's artistic value or on the artistic purpose of the members of the Cooperative (R. 238-242). Joseph Kaster, a

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[4] Primarily in response to questioning by the court, the meaning of Miss Sontag's review was explored, particularly those portions which dealt with her characterization of the film as an unconventional, artistic treatment of themes which, by current community standards, were ludicrous or ridiculous to most men, as a brilliant work of art about joy and innocence that satirically and mockingly confronted sex, including perverse sex scorned by most men, and as a non-pornographic depiction of sexual embraces and nakedness, too full of pathos and ingenuity to be prurient (R. 211-214, 218-226).

Ph.D. teacher of numerous courses at the New School for Social Research, testified that he had shown "Flaming Creatures" to his class of 40 adults who were studying the myths and rituals of Western Civilization (R. 244-247), but successful, repeated objections blocked him from linking the film to any particular myth, theme, or portion of ancient history and, thereby, highlighting its educational, historical, and artistic value (R. 247-252).

Robert Trumbull, a volunteer clerk at the Film-Makers' Cooperative, who was familiar with the functions and operations of the organization, was not able, because of objections which were sustained, to address the court fully on the subject of the Cooperative's history or the nature of its membership (R. 254-257). He did indicate that the New Bowery Theatre was operated by the American Theatre for Poets, Inc. (a group into whose composition the court refused to allow inquiry), through whom the film's showing on March 3rd was arranged (R. 256-257).

Allen Ginsburg, poet and lecturer on American culture, knew Jack Smith and the movie, and was familiar with contemporary art in all its forms, but his opinion that the film had aesthetic and artistic value as well as social importance was stricken from the record (R. 270-274).

The People and appellants stipulated that had appellants called Charles Levine, who was present at the showing of "Flaming Creatures" on March 3rd, he would have testified that the audience was composed entirely of adults who were well-behaved and exhibited no abnormal reaction or behavior during the film (R. 280-281), and further, that if appellants had called Drs. Edward Hornick and John Thompson, both highly qualified psychiatrists and professors of medicine, each would have testified that he had seen the movie and in his opinion it was an artistic effort, the effect of which was the opposite of exciting, arousing, or impelling the viewer to abnormal anti-social conduct (R.

281-284, 286-288). The People's objections to the proposed testimony were sustained (R. 283-289).

Appellants moved to dismiss the complaints against them on the grounds that the People had not proven beyond a reasonable doubt that the film was obscene in accordance with the constitutionally permissible test, that there was an appeal to anyone's prurient interest, that there was commercial exploitation of sex, or that appellants had the requisite guilty knowledge (R. 290-292, 299-300). In reply, the People, contended, among other things, that the case law ruled out artistic merit as an adequate answer to a charge of obscenity and that motion pictures had less thematic freedom under the Constitution than speech or literature. Appellants' motion was denied without explanation (R. 302).

The Questions Are Substantial

The issues involved in this appeal are the inevitable sequel to this Court's decisions last term in *Memoirs* v. *Massachusetts*, 383 U.S. 413, *Ginzburg* v. *United States*, 383 U.S. 463, and *Mishkin* v. *New York*, 383 U.S. 502. The viability of the test of obscenity set forth in those cases and, previously, in *Roth* v. *United States*, 354 U.S. 476, 489, as well as the ability of this Court to exercise its "independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected," *Jacobellis* v. *Ohio*, 378 U.S. 184, 190, ultimately depend upon the evidence which state (and federal) courts are willing to consider in trying obscenity cases. If the trial courts are free to turn their backs on every defense attempt to introduce evidence, expert and otherwise, bearing on (1) the artistic and educational merits of the material, (2) the prevailing community standards and the degree of public acceptance of comparable material, (3) the nature of the predominant appeal of the material for both adults and

the special audience to which it was directed, (4) the character of the audience for which the material was designed and to which it was directed, (5) the manner in which the material was promoted, and (6) the good reputation of its creator and its distributor, then the standards of obscenity adopted by this Court will be hollow words and its responsibility to supervise and review will be frustrated.[5]

Members of this Court have commented upon the need for and value of various types of testimony, especially that of expert witnesses, offered by obscenity defendants. See especially, Frankfurter, J., concurring, and Harlan, J., concurring in part and dissenting in part, in *Smith* v. *California*, 361 U.S. 147, 160, 164-167 and 169, 171-172. See also Brennan, J., in *Jacobellis* v. *Ohio*, *supra*, 378 U.S. at 196 (reliance upon favorable criticism and widespread exposure of film) and in *Memoirs* v. *Massachusetts*, *supra*, 383 U.S. at 415-416, n.2 and 419 (reciting expert testimony); Doug-

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[5] Model Penal Code §251.4 (Proposed Official Draft, 1962) reads as follows:

"(4) Evidence; Adjudication of Obscenity. In any prosecution under this Section evidence shall be admissible to show:

(a) the character of the audience for which the material was designed or to which it was directed;

(b) what the predominant appeal of the material would be for ordinary adults or any special audience to which it was directed, and what effect, if any, it would probably have on conduct of such people;

(c) artistic, literary, scientific, educational or other merits of the material;

(d) the degree of public acceptance of the material in the United States;

(e) appeal to prurient interest, or absence thereof, in advertising or other promotion of the material; and

(f) the good repute of the author, creator, publisher or other person from whom the material originated.

Expert testimony and testimony of the author, creator, publisher or other person from whom the material originated, relating to factors entering into the determination of the issue of obscenity, shall be admissible. The Court shall dismiss a prosecution for obscenity if it is satisfied that the material is not obscene."

las, J., in *Memoirs* v. *Massachusetts, supra*, 383 U.S. at 427 (the wisdom of experts must be evaluated) and in *Ginzburg* v. *United States, supra*, 383 U.S. at 485-488 (the court should honor the experts' opinions); Harlan, J. in *Memoirs* v. *Massachusetts*, 383 U.S. at 459 (experts' testimony should be accepted as decisive of social value); White, J. in *Memoirs* v. *Massachusetts*, 383 U.S. at 462 (court to decide social importance on the basis of all the evidence, including that from experts). Until now, however, this Court has never passed upon the due process right of defendants charged with obscenity to introduce at least some evidence, expert or otherwise, relevant to each of the criteria specified above which form the constitutionally compelled definition of "obscenity." Now that this Court has more fully elaborated its standards setting the permissible bounds of censorship by criminal prosecution, it should seek to insure adherence to those standards and prevent their evasion not only through formal instructions and decisions, but also through the more indirect method of curtailing the due process right of obscenity defendants to present their case.

What occurred in this case is highly instructive. The Criminal Court rejected outright appellants' efforts to provide it with material bearing upon its determination of whether or not "Flaming Creatures" was obscene. The exclusionary rulings of Judge Impellitteri and Castaldi (Judge Rohan dissented) were all-inclusive, encompassing not only oral opinion testimony by experts (R. 145-159, 165-171, 179-184, 196-199, 239-240, 248-252, 272-275, 280-288), but also film contents comparisons (R. 154-159, 168-169, 182-184, 199-205) and testimony from eyewitnesses and others with personal knowledge of the matters about which they were questioned (R. 184-187, 206-207, 241-242, 256-257, 280-281). The court was unwilling to hear evidence, whatever its form, concerning the artistic value and other social importance of the film, including the proffered opinion that

it was an artistic, poetic work (R. 147-148, 150, 165-167, 182, 184, 273-274, 282, 287), a satire on sex in our culture (R. 147-148, 150, 184), a modern version of the Dionysian myth (R. 247-252) and an unconventional experiment challenging both traditional cinematic technique and traditional attitudes (R. 165-167, 184). Every attempt by appellants to introduce evidence on community standards was equally turned aside, particularly their efforts to demonstrate that films containing equivalent scenes of sexual contact were being widely exhibited in this country and in New York itself, where they had been licensed (R. 154-159, 168-169, 179, 182-184, 199-205). The same treatment was accorded testimony directed to discovering the film's predominant appeal for and effect upon not only ordinary adults, but also appreciators of and participants in the avant-garde movement and the audience which viewed it on March 3rd (R. 145-150, 167-168, 170-171, 180-181, 196-199, 239-240, 250-251, 275, 282-285, 287-288).

Proof directed to the role of the Film-Makers' Cooperative in dealing in avant-garde films for select audiences who were concerned with film as an art form, the character of the audience in attendance on March 3rd, and the nature of the group under whose auspices the theatre was obtained that night was excluded (R. 256-257, 262-263, 280-281). Although the trial court allowed the prosecution to point out the manner in which the film was promoted—one public notice, not an advertisement, in *The Village Voice* (R. 267-268), it severely limited appellants' ability to reconstruct the non-commercial, artistic setting (R. 256-257, 262-263, 280-281). Finally, the court ruled out all evidence designed to show the reputation of either Jack Smith, the picture's creator, or Jonas Mekas, its distributor (R. 184-187, 205-206, 241-242).

As a result of the trial court's unyielding refusal to permit appellants to enlighten it upon any of the elements of

the constitutional test of "obscenity", in conjunction with the People's utter failure to do so, this Court is confronted with a conviction whose basis is impossible to ascertain. Did the trial court, acting two weeks before this Court rendered its decision in *Jacobellis* v. *Ohio, supra,* reject social and artistic importance as a test independent of prurient appeal? Did it act, after viewing the movie, upon the theory that no social value, whatever its evidentiary support, could outweigh the film's prurient appeal and patent offensiveness? Or did it think that artistic and social value measured by the concerns of a cultural minority either was not properly cognizable or else could never be more than minimal, hence constitutionally insignificant? Or did the majority of the judges feel that they were fully competent to decide by relying upon their own personal views of the film's worth unaided by any testimony at all? The record of the People's objections and the court's exclusionary rulings is ambiguous enough to support any and all of these readings. The first three positions involve erroneous interpretations of the constitutional standard. The last provides a conveniently inscrutable mask behind which the trial court could conceal more fundamental error.

The People in their Motion to Dismiss or Affirm highlight the extraordinary discretion the trial courts may presently exercise to permit some obscenity defendants to put on their case yet bar others, particularly those who appeal to unconventional artistic and social values, from having their day in court. Redeeming value, the People suggest, "must be judged by the courts, perhaps, in some cases, with the aid of experts and critics." Motion, p. 8. What the People essentially want this Court to affirm, given its (although not necessarily the trial court's) acceptance of *Jacobellis* v. *Ohio, supra,* and *Memoirs* v. *Massachusetts, supra,* is the proposition that certain works may so offend particular judges and be so devoid, "on their face" as viewed by such judges' private images of the average man,

of artistic and social value, that the judges can properly label them obscene and decline to hear any evidence the defense may tender of subtle values neither obvious nor intelligible to the judges or, perhaps, the average man.

To sanction this approach by allowing trial judges to make their own independent value judgments unhampered by any requirement that they admit any properly presented evidence on each of the six factors specified *supra*, pp. 8-9, is to remove all the protections this Court believed it had erected in *Roth* v. *United States supra*, and its successors, for the work whose artistic and social values are apparent only to and appreciated only by a minority on the frontiers of artistic expression and human knowledge, *i.e.*, the avant-garde. Unless this Court takes the opportunity, provided by this appeal, to elaborate minimal rules of admissibility incumbent upon courts handling obscenity cases, it will not be able satisfactorily to safeguard First Amendment freedom of expression for minorities who experiment with ideas and designs and techniques. The result of silence in this matter will be to countenance the stifling of creativity, while pretending to protect it. The constitutional standards will not operate to assure that works with redeeming value are distributable, but rather as camouflage for their suppression and the negation of the possibility of effective, independent judicial review.

This case is by no means an isolated instance. The threat to freedom in the modern cinema and, indeed, the novel, the painting, and the theatre of the 1960's that this case so clearly dramatizes will remain until this Court offers direction to trial judges on the limits of their power to exclude evidence in obscenity cases. The courts are already in considerable conflict as to how to proceed. The Fifth Circuit, the Western District of Michigan, and the highest courts in California and Maryland would supplement the judges' "necessarily limited, hit-or-miss subjective view[s]", *Smith* v. *California*, *supra*, 361 U.S. at 165

(Frankfurter, J. concurring) with expert evidence on such matters as social value and contemporary community standards. *Kahm* v. *United States*, 300 F.2d 78, 84 (5th Cir. 1962); *United States* v. *West Coast News Co.*, 228 F. Supp. 171, 182-191 (W.D. Mich. 1964); *In re Harris*, 56 Cal. 2d 879, 16 Cal. Rptr. 889, 366 P.2d 305 (1961); *Dunn* v. *Maryland St. Bd. of Censors*, 240 Md. 249, 213 A.2d 751, 754 (1965). The District of Columbia Circuit and the New York courts are on record as banning various forms of defense evidence where the work is allegedly obscene "on its face." *Womack* v. *United States*, 294 F.2d 204, 206 (D.C. Cir. 1961); *People* v. *Finkelstein*, 11 N.Y.2d 300, *cert. denied*, 371 U.S. 863 (1962), *People* v. *Muller*, 96 N.Y. 408 (1884).

We do not ask this Court to require that trial courts be bound by the views of experts or by proof adduced by other means. We do not suggest that judges be placed in an evidentiary straitjacket with their right to make the ultimate conclusion of law as to obscenity *vel non* preempted. We do urge that they be required, before coming to that conclusion, at least to listen to views of experts and take cognizance of other defense evidence relevant to the constitutional standards in order to temper their personal reactions, prevent their concealing attitudes hostile to the controlling standards, provide a record substantial enough to enable this Court to utilize fully its power of review, and uphold the integrity of the First Amendment as it shelters unorthodox, experimental, and creative expression.

Conclusion

For the reasons stated above, this appeal presents substantial federal questions. The Court should note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

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